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IN THE

Supreme Court of the United States

October Term, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—against—

CARVEL CORPORATION, *et al.*,

Respondents.

ANSWERING BRIEF FOR THE CARVEL RESPONDENTS

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April 25, 1965

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Petitioners' reply brief, although limited to one issue, is fundamentally defective. Petitioners now confine their argument to the sole issue of whether the concurrent findings of the lower courts that unlawful tying agreements are not present in this case, are clearly erroneous. We avail ourselves of the privilege of filing an answer for the purpose of showing the basic infirmities of petitioners' argument on this single issue which they characterize as "paramount in this case."

ARGUMENT

1. Petitioners wrongly assume that an initial decision by a hearing examiner in another case, on another record, is of any use or cogency on this appeal.

Petitioners refer to a case brought in 1964 by the Federal Trade Commission under § 5 of the Federal Trade Commission Act against a number of the Carvel corpora-

tions (and the individuals who are their principal officers). That case is now *sub judice* before the Commission on cross appeals from the initial decision of the hearing examiner, dated May 25, 1964, by Carvel and the "complaint" counsel of the Commission. Petitioners rely on that part of the initial decision which finds that the tying product is the Carvel franchise, and that the dealers are unlawfully required to purchase from Carvel "... the tied product, particularly freezers, mix, cones and commissary items." (Initial Decision (I.D.) ¶ 60, p. 21)

The hearing examiner stated that he was "not unmindful" of the decision by the United States Court of Appeals for the Second Circuit in this (the *Susser*) case. He made no attempt, however, to distinguish that decision beyond stating his view "... that the legal issues before the Court were different from those here presented, and that the Court was dealing with facts which were different in material respects from the facts in this record." (I.D. ¶ 106, pp. 34-35) The initial decision concludes its reference to the opinion in this case by the court below, saying:

> "This [initial] decision has been made on the basis of the issues and facts presented in this record, without extending it by a detailed discussion to distinguish them from those which were before the Court." * (*id.* p. 35)

* In Carvel's appeal to the Federal Trade Commission argued on November 18, 1964 (and not yet decided), we urged that the analysis of the nature and effect of the Carvel franchise agreement and the reasoning of the courts below in this case provide adequate guide lines for the decision by the Commission in favor of Carvel notwithstanding the differences in the records.

Under the Commission's Rules of Practice (§ 3.21) a timely appeal from an initial decision deprives it as well as the order recommended by the hearing examiner of all force and effect.

That the concurrent findings of the lower courts deserve to be discarded in favor of the adoption by this Court of the contrary findings, analysis and reasoning of the hearing examiner in the other case, is the altogether untenable position of petitioners' reply brief.

2. Petitioners' premise that the purchase requirements of the Carvel franchise agreements are co-extensive with all the products that the dealer needs to buy, is plainly wrong.

Petitioners contend that the Carvel dealer is required "to buy practically all of his commissary items, supplies and equipment from Carvel" (Reply Brief, p. 2). On this assumption, petitioners refer to the dollar total of Carvel sales in 1960 of mix, other ingredients and supplies and equipment as ". . . tied-in gross sales by Carvel to its franchise dealers in the five state market . . ." (*id.* p. 4)

These factual contentions of petitioners are in clear and direct contradiction of the evidence in this case. The parties stipulated (R. 30) that the area of greatest concentration of Carvel sales was in the states of New York, New Jersey, Pennsylvania, Connecticut and Massachusetts. The amount of Carvel annual sales was also stipulated (R. 27). However, the stipulated annual sales, including those for the year 1960 to which petitioners specifically refer, cover sales not only within the five state area, as petitioners wrongly assert, but the sale to all Carvel retail outlets which, as the Court of Appeals found, are ". . . located throughout the eastern portion of the United States from Maine to Florida and as far west as Wisconsin" (R. 434).

It was further noted by the Court below that two-thirds of the gross sales by Carvel ". . . constitute sales of the Carvel secret formula mix which surely could legally be tied to the Carvel trade-mark if that mark was to retain its significance, as he [Chief Judge Lumbard] concedes" (R. 451, fn. 2).

Petitioners further wrongly contend that the dealers are required to purchase from Carvel their requirements of all other ingredients and supplies and equipment. The uncontradicted evidence in this record is that the dealers are required under the franchise agreement to purchase from Carvel only those articles, principally ice cream mix, which are part of the ice cream end products offered for sale to the public under the Carvel trademark (R. 434; Our Main Brief, pp. 13, 16, 17, 32-33, 59, also Appendix "A", pp. 1a, 2a-3a).

The court below found that the figures representing total annual sales by Carvel ". . . shed no light on the amount of 'tied sales' here complained of, which common sense tells us must be a minor part" (R. 451). As an illustration of "insubstantiality" of the commerce affected, the Court points out that the 1960 sales of other ingredients and supplies of $1,354,599 (referred to in the Reply Brief, p. 4), represent "an average of less than $3,400 per dealer per year; the record does not make it clear whether all these 'ingredients' were tied" (R. 451, fn. 2).

It is true that petitioners made no attempt at the trial to differentiate between the ingredients which were incorporated as part of the end product sold to the public under the Carvel trademark and those that were not. What the record does show is that the total sales of ingredients and

supplies (which in 1960 reached the total mentioned of $1,354,599) embrace over 500 separate items. Of these, some seventy are, when used, made part of the end product and are required under the franchise agreement to be purchased from Carvel (Pl. Ex. 8-A, § H, Supply List No. 1, 6 and 10; among the exhibits designated and brought to the court). Accordingly, the average sales of ingredients and supplies of less than $3,400 per dealer per year is necessarily considerably less when limited to the seventy essential ingredients and supplies.

While the dealer is required to purchase such of the ingredients and supplies as are components of the end product, no such requirement applies to any equipment which a dealer desires to purchase (R. 208, 212-213, Pl. Ex. 1, ¶ Ninth, 3148). There is abundant evidence in the record that the dealers frequently exercise their right to purchase equipment from non-Carvel sources. (Our Main Brief, pp. 24-25, App. A, 1a.) These instances involved clearance with Carvel that such equipment was consistent with Carvel standards. The claim repeatedly made by petitioners that the Carvel manual did not include specifications of equipment (Their Main Brief, pp. 21, 22, 23) is untrue. Page after page of the manual sets out standards and specifications for minor as well as important pieces of equipment (Pl. Ex. 8-A, § M, pp. 1-8, 13-16).

That there is no basis for regarding equipment as one of the tied products is confirmed by the absence of any reference in any of the opinions by the courts below to equipment as a "tied" product. Equipment is mentioned in another context, namely, that under the circumstances of this case, the equipment (whether patented or unpatented),

in the Carvel outlets cannot be considered as a "tying" product (R. 56, R. 452; Our Main Brief, pp. 23, 24, 53-54). It is worth noting that petitioners' main brief and reply brief take altogether different positions with respect to equipment. Their first brief contends that Carvel equipment is a tying product (Their Main Brief, pp. 12, 14, 22, 24), a contention rejected by the trial court (R. 56) and by the Court of Appeals (R. 452). Their reply brief shifts to the contention that equipment is one of the tied products (Reply Brief, pp. 2, 4, 5) in complete disregard of the evidence already referred to that the restrictions of the franchise agreement did not apply to equipment, and that the dealers acted accordingly.

While petitioners regard the issue of illicit tying as paramount, they nevertheless do not attempt in their reply brief to deal with the fundamentals of the subject. They fail to answer our argument documented by references to the record, the findings of the courts below and the pertinent decisions, that the factual prerequisites for illegal tying arrangements are absent from the Carvel franchise system (Our Main Brief, pp. 45-61, 62-69). Nor do they attempt to answer our argument that Carvel did not, in the context of the proof in this record, exceed what the law authorizes, permits or expects of an owner of trade secrets and trademarks in contractual arrangements with licensees (*id.*, pp. 70-92).

Petitioners concentrate rather upon an attempt to enlarge the impact upon commerce of the Carvel business. This desire to exaggerate manifests itself, as already shown, in their argument that the franchise agreement makes it mandatory for dealers to buy practically all their needs

from Carvel, a position wholly at variance with the evidence in this case and the findings of the courts based thereon. Petitioners rely on other distortions to magnify the putative economic power of Carvel in the ice cream business.

Petitioners refer to a claim in a Carvel advertisement that the Carvel outlets in a period of twenty-one years served over ten million customers (R. 427) involving, as petitioners prefer to say, three billion individual servings by retailers who, during the twenty-one year period, grossed over three hundred million dollars (Reply Brief, p. 6). This contrasts with the petitioners acceptance in the trial court of a stipulation that the annual sales by Carvel retailers was between six and eight million dollars (R. 29; this was part of a pre-trial stipulation dealing with other matters as well, Tr. 3419).

Multiplication of annual sales and servings to customers by the span of twenty-one years may yield figures that look astronomical but hardly represents evidence of economic power in the context of the antitrust laws. The figures do show a rather consistent consumer acceptance of the ice cream products sold under the Carvel trademark. Undoubtedly, the reputation of the franchising organization and the performance of existing franchised dealers would be considered by anyone desiring to enter the ice cream business and become part of the Carvel chain. This, however, is a far cry from the intimation in the reply brief (p. 6) that communication of the extent of consumer acceptance of the Carvel products operates to coerce entry into the Carvel franchise agreement. Petitioners' reply brief does not contend—nor would the record justify the argument—that the applicant for a dealership is confronted with buy-

ing requirements after he becomes a Carvel dealer which differ from those set forth in his franchise agreement. Thus, the circumstances of this case are essentially different from the gasoline cases where subsequent "salesmanship" influences a dealer to purchase sponsored T.B.A. products, not mentioned in the dealership contract. Furthermore, the required purchase of essential components of the ice cream products sold under the Carvel trademark is altogether different from tying to the sale of gasoline the purchase of unrelated T.B.A. products (Our Main Brief, pp. 55-59).

Predatory motives are attributed to Carvel in petitioners' reply brief, undocumented and in fact contradicted by substantial evidence. It was found below that the restrictive clauses of the Carvel franchise ". . . are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields" (R. 62, 453). No showing has been made why these and related findings by the lower courts should be regarded as clearly erroneous.

It is strange indeed that petitioners' reply brief should now speculate about the motivation of dealers for entering into the Carvel franchise agreement. Inference and argument cannot overcome the failure of any of the petitioners to testify or to call other Carvel dealers or ex-dealers to testify at the antitrust trial. If any widespread grievance based on the pinch of so-called tying requirements really existed, the aggrieved would not shun the witness stand; nor would their trial lawyer dodge production of witnesses, especially clients, so readily available and normally eager to tell their story. The trial court informed petitioners' counsel that: "You could have produced all the live witnesses you wanted" (Our Main Brief, p. 84).

The absence of any dealer testimony relating to the alleged tying agreements and their operation, is actually fully consistent with the absence of any reliance in the complaints upon claims of improper tie-ins. We have already shown that none of the complaints of petitioners filed between September 1959 and May 1960 stated a claim based on illegal tying requirements (Our Main Brief, pp. 10, 6-9). There is an air of unreality about petitioners now advancing as paramount in this case, claims which were not asserted in the petitioners' complaints and about which petitioners did not give or produce any testimony. No less unreal is the argument that Carvel seeks for its own gain "to isolate the dealers from the market place" in the light of another argument which acknowledges that the average dealer, "displaying the Carvel trademark" invests "approximately $10,500" and "grosses $40,000, nets $13,000" (Reply Brief, cf. pp. 10 and 6).

3. Petitioners' schedules and calculations of Carvel's share in the five state market area are misleading, inaccurate and wholly unreliable.

Petitioners' reply brief (p. 5) takes the liberty of changing the description of Carvel defendants' Exhibit C-9 (R. 315) in substantial manner. They interpose the word "soft" before the term "ice cream mix". In point of fact Exhibit C-9 is a "schedule of gallonage of total Carvel ice cream mix sold by the Carvel corporate defendants" in the five state area from 1953 to 1960. Petitioners never sought to establish that the product line involved is soft ice cream or that the chief ingredient could accurately be designated soft ice cream mix. On the contrary, the complaint "sub-

mitted as typical" (R. 137) refers to the products sold under the Carvel name as "ice cream and allied products" (R. 139). Moreover, the franchise agreement itself refers throughout only to "Carvel's Frozen Dairy Product", and recites the new dealer's desire to produce and sell the same in accordance with the provisions of the SOP (Pl. Ex. 1, Preamble, ¶¶ "2", "3", "Fourth", "Sixth", "Seventh" and "Eighth", R. 208, 209, 211-12). Indeed, petitioners stipulated (R. 178-179) that what the dairy delivered on behalf of Carvel to its dealers was ice cream mix, which is first processed to obtain soft ice cream and subsequently frozen to obtain hard ice cream.

The undisputed testimony of a dairy manager amplifies this stipulation. He confirms that his dairy makes a special Carvel mix according to secret formula supplied by Carvel. The tag attached by the dairy to the cans of mix shipped to the dealers describes their contents only as "Ice Cream Mix" (Def. Ex. H-4, R. 325, 3553). This Carvel mix is used to make the soft serve product as well as the take-home products which consist of hard ice cream frozen to five or ten degrees below zero, and packaged in pints or quarts (R. 191-192).* Petitioners' belated insistence that Carvel's mix is a "soft" ice cream mix and that its product line is "soft" ice cream merits no attention here because the point was not raised at the trial or in petitioners' previous briefs.

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* Extensive documentary proof establishes that Carvel dealers sell a full line of both soft and hard ice cream, hardened novelties and ices. Pl. Ex. 8-A, § H, Supply List No. 10; § J pp. 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59; Def. Ex. C-8, R. 426, 3482.

Defendants' Exhibit C-10 consisting of the statistical reports of the United States Department of Agriculture for the years 1953 through 1960, were received in evidence following a precise identification of the tables and figures for which they were offered, namely, "the total gallonage production of frozen dairy products for each of the five states mentioned" (R. 156). At first, petitioners' counsel objected to the admission in evidence of these officially published government statistics on the grounds that their publication by a government agency "does not authenticate them" and on the further ground that on his theory of the case no economic data was relevant (Tr. 3498).

The additional Exhibits C-11 and C-12 (R. 317-319) compared the government figures for the production of frozen dairy products with the sales in corresponding areas and years of Carvel ice cream mix. They were admitted in evidence subject to verification by petitioners' counsel (R. 157). After Mr. Rothstein, counsel for petitioners, inspected Exhibits C-10, C-11 and C-12, he made an observation not an objection, as the following colloquy reveals (Tr. 3605-6):

> "Mr. Rothstein: We have one loose end here we may as well tie up with reference to the exhibits introduced by Mr. Weisman on the figures and computations based on the Department of Agriculture publications. I just want to make this observation on it:
>
> "Those Department of Agriculture publications, and of course Mr. Weisman's computations based on them, refer only to ice cream mix with no demarcation as between soft and hard ice cream.
>
> "The Court: I understand that.
>
> "Mr. Rothstein: We are in the soft ice cream business.

"The Court: I understand also some of the places do double-freeze this and sell hard ice cream."

Petitioners' reply brief now criticizes the use for comparison purposes of statistics concerning the production of frozen dairy products (Reply Brief, p. 5, fn.). We submit that the end products sold under the Carvel name fairly fall within the category of frozen dairy products because the regular practice of the Carvel dealers is to make and sell the hard ice cream in customary form as well as the novelty dessert products bearing individual and "glamorous names" (R. 179), numerous enough to earn the characterization of a "picturesque list" (R. 193). Let us assume *arguendo* that the criticism of the use of frozen dairy products as the basis for comparison has some justification. The alternative on this record is not to restrict the comparison to one between the Carvel special formula mix, wrongly characterized as soft ice cream mix, and sales of soft ice cream only, as though this was the only product sold under the Carvel name. Yet, this is exactly the comparison which petitioners' reply brief advances for the selected year 1959 (Reply Brief, p. 5).

The proper alternative on this record—if any alternative is required—is a comparison between the gallonage of Carvel's special formula mix with the government figures concerning the production of ice cream mix. [Incidentally, the federal standards of identity promulgated by the Food and Drug Administration do not define and make no reference to "soft ice cream mix", the term introduced by petitioners' reply brief; the definition and specification of standards relate only to "ice cream mix". See 26 F.R. 11676.]

Comparison made on the proper basis, i.e. between sales of Carvel ice cream mix and the state-wide production of ice cream mix, dramatically demonstrates that the table and calculations of petitioners' reply brief (p. 5) are wholly misleading and unreliable.

	"Schedule of Gallonage of Total Carvel Ice Cream Mix sold by the Carvel Corporate Defendants in . . ." (R. 315, Ex. C-9)(a)	1959 Total State Production of "Ice Cream Mix" as reported by United States Department of Agriculture (R. 156, Ex. C-10)	Percentage of Column (1) to (2)
Conn.	143,340	5,264,000(b)	2.72
Mass.	24,380	14,676,000(c)	0.166
Pa.	159,920	42,212,000(d)	0.378
N.J.	347,000	10,469,000(e)	3.314
N.Y.	1,190,920	41,087,000(f)	2.899

We see no need for printing similar schedules for the years 1953-1958 and 1960. We prepared them and represent that Carvel's percentage share of ice cream mix sold in the five states is substantially the same as in 1959. The Carvel share ranges in all those years from a low of less than one-fifth of one percent to a high not exceeding three and one-third percent. The shift from frozen dairy products to ice cream mix as the ba is of calculating Carvel's

(a) These figures, to which no objection was made, were taken from the Carvel books and records.

(b) Table 10 fourth line from bottom of page 23 of U.S. Department of Agriculture Bulletin, 1959 Production of Manufactured Dairy Products, published August 1960.

(c) id., Table 10, fourth line from the bottom of page 26.

(d) id., Table 10, fourth line from the bottom of page 30.

(e) id., Table 10, fourth line from the bottom of page 28.

(f) id., Table 10, fourth line from the bottom of page 29.

market share of the chief ingredient does not result in any significant increase over the lower percentage shown by the original exhibits, namely, between one and two per cent (Our Main Brief, pp. 97, 68).

Petitioners argue about foreclosure of competition in the suppliers' market while entirely ignoring the finding by the Court of Appeals that suppliers of mix and other ingredients can compete to obtain supply contracts from Carvel on a year to year basis (R. 452). This finding is fortified by the concession in the minority opinion that by the nature of things such competition is "vigorous" at least among suppliers who are qualified to meet "Carvel's price and service demands" (R. 443). Moreover petitioners "failed to prove that they were foreclosed from alternate sources of supply" (R. 449). Likewise, their reply brief is barren of any attempt to refute the findings that in the area of the greatest concentration of stores, New York, Connecticut and Massachusetts, where two hundred and fifty out of the total of four hundred Carvel outlets are located, there is a total of 125,000 retail vendors of ice cream. This leads to the finding that Carvel outlets amount ". . . to one-fifth of one percent of the outlets and apparently doing about one percent of the business" (R. 451). These figures are found in one of petitioners' exhibits (Pls. Ex. 24, R. 113, 3245).

No challenge is offered in the reply brief to the findings that ". . . the facts . . . showed neither that Carvel had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' nor that 'a not insubstantial amount of commerce is affected'. Indeed, such figures as exist would

prove the contrary" (R. 450-451). Petitioners are content merely to name the very cases (p. 6) containing the standards which the Court of Appeals deemed appropriate to apply to the findings of fact on the evidence in this case. These findings in both courts below are adverse to petitioners' claims as well as to their past and present contentions. Nothing has been shown as a basis for finding clear error by the trial or appellate courts.

4. Petitioners' reply brief misconceives the nature of the Carvel franchise system.

Petitioners' reply brief argues as though an applicant for a Carvel franchise is interested in entering the retail food business and in obtaining the right to display the Carvel trademark in connection with sales of ice cream (Reply Brief, p. 1); and that for such privilege plus "Carvel's expert supervision and guidance" the applicant "is willing to pay a royalty to Carvel" (*id.* p. 2). But since Carvel couples the royalty for use of its trademarks, supervision and marketing guidance with a commitment to purchase certain products from Carvel—so their argument goes—the "franchise applicant has but one choice", to enter into the Carvel franchise agreement (*id.*). Absurd!

This is not argument on, but removed from the facts in the record. This contention has no bearing on the true relationship between Carvel and a prospective dealer who is free to choose among many available ice cream franchising organizations, including those with less exacting standards than Carvel's (R. 451, 454). Nor does such argumentation accurately reflect the relationship subsequent to the execution of the franchise agreement. Petitioners sedulously avoid the findings of the trial court and a unani-

mous Court of Appeals that Carvel may lawfully: (i) exclude association of non-Carvel products with the Carvel trademark (R. 448, 60-63), (ii) insist that the retail outlets be "uniform in appearance and operation" and offer the public "identical products at a uniform standard of quality" (R. 448, R. 62), and (iii) require the sole use of the trademarked items (*id.*).

Petitioners argue that the factors of stability of supply and continuity of customer relationship are indicia of inevitable illegality of total requirements and exclusive dealing provisions (Reply Brief, p. 8, 9). This is directly contrary to the conclusions of the court below (R. 446) with no disclosure of the basis for claiming clear error.

We come now to the treatment in petitioners' reply brief of the justification for maintaining, by restrictive franchise provisions, the secrecy of Carvel's special formulae for mix and other essential components which become part of the end products sold under the Carvel trademark.

The reply brief does not reach this question of justification in the context in which the courts below considered it. The trial court evaluated the evidence bearing on justification and found it sufficient and necessary to protect Carvel's business and good will; it found, relatedly, that there was sufficient evidence to show that such protection could not be achieved by making the secret and special specifications available to suppliers in the market or to the dealers themselves, and also that if these specifications were released, supervision and policing of quality and uniformity would impose an impracticable burden on Carvel (R. 59). The Court of Appeals found no reason for disturbing these findings and made confirmatory findings of its own (R. 453-454).

The reply brief does not endeavor by analysis of the record to show error by the courts below in making these findings and conclusions, or to refute our argument (Our Main Brief, pp. 81-92) that such findings and conclusions, far from being clearly erroneous, are supported by substantial evidence. Petitioners merely adopt the directly opposite view of the hearing examiner in the Federal Trade Commission case (Reply Brief, pp. 7-8). Their argument is nothing more than a distillation of his reasoning. They, like he, are indifferent to the sacrifice of special formulae and good will, valuable to the dealers as well as to Carvel (Our Main Brief, pp. 89-91). Petitioners argue as though his mere expression of the view that Carvel's business and good will can be protected through publication of specifications, is sufficient ground to discard as clearly erroneous the directly contrary findings and conclusions of the trial court and of the Court of Appeals.

It is nothing short of remarkable that petitioners eschew mention of the dissent of Chief Judge Lumbard, who did not go along with the majority's finding that Carvel need not publish specifications of its secret formulae to avoid loss thereof and injury to its good will. Perhaps petitioners shunned reference to the dissent because Chief Judge Lumbard's dissatisfaction with the sufficiency of the evidence of justification led him to recommend ". . . remand [of] the cause to the district court for further hearing limited to the issue of justification", a flexible resolution of the problem precipitated by his dissent; contemplating that: "If Carvel could establish its claim the result ultimately would be the same" (R. 446), i.e., in accord with the majority. Evidently petitioners preferred the inflexible conclusion of the hearing examiner, on a fee-

ord which he regarded as materially different from the record in this case, because he excludes the concept that Carvel's preservation of the secrecy of its formulae could ever be legally justified.

The reply brief does not begin to come to grips with petitioners' obligation to show on the evidence in this record that the courts below were clearly in error. The Court of Appeals found that: (a) The Carvel dealers suffered no economic damage by compliance with the requirement to purchase essential ingredients from Carvel (R. 52) or at worst, inconsequential damage (R. 51) of trivial scope (R. 53); (b) to compel Carvel to limit itself to advance specifications of standards for essential commodities covered by the purchase requirements of the franchise agreement, would impose an impractical and unreasonable burden of formulation, and the record affords no sufficient basis for upsetting the trial court's finding to this effect (R. 453); (c) there is no basis for rejecting as insufficient the testimony which the trial court regarded as reasonable and persuasive, to the effect that it was impracticable to handle the problem of assuring uniformity and quality of the products sold under the Carvel trademark by specification and policing (*id.*); (d) there is a limit to the amount of inspection which is feasible with relation to finished trademark products sold in ten and twenty cent units by numerous and scattered dealers whose annual purchases from Carvel, including equipment, total less than $12,000 a year per outlet (R. 454); (e) Carvel's ability to furnish specifications to its own source of supply whose product is regularly checked, does not show that administration could be entrusted to four hundred dealers (R. 453); and (f) the circumstance

that a competing franchising organization, which licenses only freezing machines under trademark and does not sell a special mix made to a secret formula, is satisfied with less exacting standards and can furnish suppliers with specifications, provides little force to the proposition that Carvel should be compelled to furnish for the suppliers' market its special formulae specifications, reflecting more exacting standards (R. 454).

That the findings of the court below just summarized, affirming similar findings by the trial court, are rooted in substantial, uncontradicted and unimpeached testimony and evidence in this record, is abundantly clear (R. 203, 41, 181; 182, 190, 191, 197-199; Our Main Brief, pp. 81-92). Equally apparent is the conclusion that the main brief filed on behalf of all the petitioners as well as the reply brief filed only on behalf of some of them,* did not, because

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* After Sidney W. Rothstein, Esq., attorney for the petitioners, failed to appear for the oral argument of this case, this Court entered an order to show cause returnable March 25, 1965, why the writ in this proceeding should not be dismissed for want of prosecution. We are informed that this order to show cause was transmitted to all of the petitioners at their last known addresses as well as to their counsel.

On March 29, 1965, this Court entered an order discharging the order to show cause and restoring the case to the calendar for argument on Thursday, April 29, 1965. The return on the order to show cause filed by Arnold Fleischmann, Esq., as attorney for those petitioners who retained him after discharging Mr. Rothstein, discloses among other things, that petitioners James and Elizabeth G. Ossola, and Matthew and Jane L. Seu, were then expected to authorize Mr. Fleischmann to appear for, and represent them in this case. The reply brief (p. 10) discloses that the Ossola and Seu petitioners apparently failed to retain counsel to replace Sidney W. Rothstein, Esq. who has abandoned the matter. It would seem that those petitioners who failed to make any return on the order to show cause, have abandoned their respective appeals. (This would also apply to petitioners Susser, Mueller and Frederick in whose appeals the Carvel respondents are not parties.)

they could not make a showing that the concurrent findings of the courts below are clearly erroneous.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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Dated: New York, N. Y.
April 25, 1965